No.

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. 702 waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian Tribe.

2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

PARTIES TO THE PROCEEDING

The petitioners are Ken L. Salazar, Secretary of the Interior, and Larry Echo Hawk, Assistant Secretary of the Interior, Indian Affairs, both of whom were defendants below.

The respondents are David Patchak, plaintiff below, and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Ken L. Salazar, Secretary of the Interior, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 632 F.3d 702. The opinion of the district court (App., *infra*, 27a-37a) is reported at 646 F. Supp. 2d 72.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2011. Petitions for rehearing were denied on March 28, 2011 (App., *infra*, 23a-24a, 25a-26a). On

June 16, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 26, 2011, and on July 18, 2011, the Chief Justice further extended the time to August 25, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in an appendix to this petition. App., *infra*, 38a-43a.

STATEMENT

1. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Band), also called the Gun Lake Band, is a federally recognized Tribe in Allegan County, Michigan. See 63 Fed. Reg. 56,936 (1998). Under the terms of the 1821 Treaty of Chicago, signed by Chief Match-E-Be-Nash-She-Wish, the Band ceded much of its land to the United States but reserved a tract of land at present-day Kalamazoo. Treaty of Chicago, 7 Stat. 219. In 1827, the Band ceded that parcel to the United States in exchange for the enlargement of one of the reserves of the Pottawatomi bands. Treaty of Sept. 19, 1827, 7 Stat. 305. Under subsequent treaties to which the Band was not a signatory, all Pottawatomi land was ceded to the United States, leaving the Band landless. Treaty of Chicago, 7 Stat. 431 (1833); Ottawa Treaty, 7 Stat. 513 (1836).

After the Band obtained federal recognition in 1998, it submitted an application to the Department of the Interior in which it asked the United States to acquire about 147 acres of land in Wayland Township, Michigan (the Bradley Property), in trust for the Band. Its application was based on the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, which authorizes the Secre-

tary of the Interior to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. Under the IRA, title to such land is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Ibid.* In May 2005, after an extensive administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. 70 Fed. Reg. 25,596-25,597. The announcement stated that "acceptance of the land into trust" would not occur for 30 days, so that "interested parties [would have] the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." *Ibid.*; see 25 C.F.R. 151.12(b).

2. During that 30-day period, an organization known as Michigan Gambling Opposition (MichGO) sued the Secretary, alleging that her decision violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, as well as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and that 25 U.S.C. 465 is an unconstitutional delegation of legislative authority to the Executive. The district court rejected those claims. *Michigan Gambling Opposition (MichGO)* v. *Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007).

MichGO appealed, and after oral argument, it attempted to add a claim that the land acquisition was not authorized under Section 465 because, according to MichGO, the Gun Lake Band was not under federal jurisdiction in 1934. See *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1061 (2009) (holding that the IRA limits the Secretary's authority "to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in

June 1934"). The court of appeals denied MichGO's motion to supplement the issues on appeal, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (Mar. 19, 2008), and then affirmed the district court's decision, *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009).

3. Respondent Patchak lives in Wayland Township, Michigan, "in close proximity to" the Bradley Property. C.A. App. 12. In 2008, a week after the court of appeals denied rehearing en banc in *Michigan Gambling Opposition*, he brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, making the argument that MichGO had attempted to raise in its appeal—*i.e.*, that the acquisition was not authorized by the IRA because the Band was not under federal jurisdiction in 1934. At the time Patchak filed his suit, title to the land had not yet been transferred to the United States in trust for the Band. When the Secretary announced that he intended to accept the land once the court of appeals issued its mandate in *Michigan Gambling Opposition*, Patchak sought what he called an "administrative stay of proceedings," which the district court denied. C.A. App. 64, 6. Patchak subsequently moved for a temporary restraining order prohibiting the trust acquisition. *Id.* at 411. The district court denied that motion as well, *id.* at 8, and on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Band, *id.* at 435-436.

The district court dismissed Patchak's complaint. App., *infra*, 27a-37a. The court held that Patchak lacked prudential standing because the injury he alleged—namely, that the gaming facility the Band proposed to operate "would detract from the quiet, family atmo-

sphere of the surrounding rural area," *id.* at 30a n.5—was not arguably within the zone of interests protected by the IRA, *id.* at 34a-36a. The court stated that its subject-matter jurisdiction was "seriously in doubt" for the additional reason that the United States has not waived its sovereign immunity to suits challenging its title to Indian trust lands. *Id.* at 37a n.12.

4. The court of appeals reversed and remanded. App., *infra*, 1a-22a. The court held that Patchak had prudential standing, reasoning that the IRA "limit[s] the Secretary's trust authority," and "[w]hen that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected." *Id.* at 7a. The court explained that, in reaching that conclusion, it "ha[d] not * * * viewed the IRA provisions in isolation." *Id.* at 8a. Instead, because the court viewed those provisions as "linked" to the IGRA, it evaluated Patchak's interests in light of the Band's intended use of the property for gaming. *Ibid.* "Taken together," the court concluded, "the limitations in [the IRA and the IGRA] arguably protected Patchak from the negative effects of an Indian gambling facility." *Ibid.* (internal quotation marks omitted).

The court of appeals also held that Patchak was a "proper entity to police the Secretary's authority to take lands into trust under the IRA." App., *infra*, 9a. The court reasoned that if the interests of a State or municipality—which might lose regulatory authority or tax revenue as a result of a trust acquisition—are within the zone of interests protected by the IRA, "then so are Patchak's interests," because his alleged injuries "may be different, but they are just as cognizable." *Id.* at 10a.

The court stated that the injuries Patchak alleged, including loss of property value, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land surrounding the casino site," are the "sorts of injuries [that] have long been considered sufficient for purposes of standing." *Ibid.*

The court of appeals next held that 5 U.S.C. 702 waived the government's sovereign immunity from Patchak's suit. App., *infra*, 10a-21a. Section 702 waives sovereign immunity for any "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702. The government contended that Patchak's suit was barred by the last sentence of Section 702, which provides that "[n]othing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.* The government argued that the Quiet Title Act (QTA), 28 U.S.C. 2409a, is such a statute. The QTA provides that the United States may be sued "to adjudicate a disputed title to real property in which the United States claims an interest," but it goes on to say that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a).

The court of appeals rejected the government's argument. Observing that "a common feature of quiet title actions is missing from this case" because Patchak was not claiming title to the land at issue, App., *infra*, 14a, the court concluded that "the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit," *id.* at 16a. In so holding, the court acknowledged that its decision created a conflict with

decisions of three other circuits. *Id.* at 18a (citing *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United States*, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)).

5. The court of appeals denied petitions for rehearing en banc. App., *infra*, 23a-24a, 25a-26a.

REASONS FOR GRANTING THE PETITION

The Quiet Title Act expressly retains the United States' sovereign immunity from suits that challenge its title to "trust or restricted Indian lands." 28 U.S.C. 2409a(a). The court of appeals has held, however, that a plaintiff may circumvent that retention of immunity through the simple expedient of suing under the Administrative Procedure Act. The court reached that conclusion even though the APA's waiver of sovereign immunity, 5 U.S.C. 702, states that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The court of appeals' decision rests on a misinterpretation of the text and history of Section 702, and it contravenes this Court's cases construing that provision and the QTA. As the court of appeals acknowledged, its decision also conflicts with the decisions of all three of the other courts of appeals to consider the question. See *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United*

States, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The decision threatens significant disruption of the United States' exercise of its trust responsibility for Indian lands, and it warrants review and correction by this Court.

In addition, in holding that the plaintiff in this case satisfied prudential-standing requirements, the court of appeals misconstrued this Court's precedents in two significant ways. Rather than evaluating whether the injury complained of was within the zone of interests protected by the statutory provision underlying the complaint, the court instead considered the interests protected by a wholly separate statute enacted decades later. And in conducting that analysis, the court conflated Article III and prudential standing principles. The court's errors compound the harmful effects of its APA holding, and they too warrant this Court's review.

A. The Court Of Appeals' Erroneous Construction Of The APA's Waiver Of Sovereign Immunity Warrants This Court's Review

1. The decision below is contrary to the text and history of Section 702 and to this Court's precedents interpreting it

a. In the 1976 amendments to the APA, Congress enacted a waiver of the federal government's sovereign immunity from suits seeking judicial review of agency action and requesting relief other than money damages. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (5 U.S.C. 702). As amended, Section 702 provides that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim

that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. 702. At the same time, however, Congress was careful to preserve the limitations prescribed in other statutes in which it had waived sovereign immunity for particular classes of cases. To that end, the last sentence of 5 U.S.C. 702(2) provides that "[n]othing herein"—that is, nothing in the APA's waiver of sovereign immunity—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The QTA, which was enacted only four years before the 1976 amendments to Section 702, is precisely the sort of "other statute" to which Congress referred when it limited the scope of the APA's waiver. Act of Oct. 25, 1972, Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (28 U.S.C. 2409a). The QTA permits the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). It goes on to say, however, that "[t]his section does not apply to trust or restricted Indian lands." *Ibid.* Even in the absence of the limitation set out in the last sentence of Section 702, general principles of statutory interpretation would suggest that a plaintiff may not rely on the APA to circumvent the QTA's specific limitations. See *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007) ("[A] precisely drawn, detailed statute pre-empts more general remedies.") (internal quotation marks and citation omitted). But the text of Section 702 removes any doubt: the QTA is an "other statute that grants consent to suit" but "expressly or impliedly

forbids the relief which is sought" in a case, such as this one, challenging the United States' title to Indian trust lands. This suit is therefore barred by Section 702 and sovereign immunity.

b. The legislative history of Section 702 confirms what is apparent from its text. In amending that provision in 1976, Congress adopted a proposal of the Administrative Conference of the United States. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4, 12, 23-24, 26-28 (1976) (*House Report*); S. Rep. No. 996, 94th Cong., 2d Sess. 3, 12, 22-23, 25-27 (1976) (*Senate Report*). In a memorandum supporting its proposal, the Administrative Conference had pointed out that its "recommendation [was] phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes * * * in which Congress has conditionally consented to suit." *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 138-139 (1970) (*1970 APA Hearing*). The Committee observed that "this result would probably have been reached by the preservation of all other 'legal or equitable ground[s]' for dismissal," *id.* at 139, in Section 702(1), which states that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702(1). But the Committee explained that "clause (2) of the final sentence of part (1) of the recommendation," that is, the clause that became Section 702(2), "is intended to prevent any question on this matter from arising." *1970 APA Hearing* 139.

As originally introduced in the Senate, the APA bill varied from the Administrative Conference's proposal in a significant respect: its version of Section 702(2) would have withheld authority to grant relief only if another statute "forbids the relief which is sought," rather than if it "*expressly or impliedly* forbids the relief which is sought," as the Administrative Conference had suggested. *Senate Report* 12, 26. On behalf of the Department of Justice, then Assistant Attorney General Scalia urged Congress to restore the phrase "expressly or impliedly." As he explained, waiver statutes enacted before 1976 were passed against the background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular waiver statute. *Id.* at 27. Assistant Attorney General Scalia observed that "this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *Ibid.* That result, he concluded, is "simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." *Ibid.*

In response to Assistant Attorney General Scalia's letter, the Senate Committee amended the provision to conform to the Administrative Conference's proposal, *Senate Report* 12, and the provision passed the House and Senate in that form. That history confirms that, under Section 702(2), "where statutory remedies already exist, these remedies will be exclusive." *Id.* at 27.

c. This Court has twice held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *United States* v. *Mottaz*, 476

U.S. 834, 841 (1986) (quoting *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983)). The Court in *Block* accordingly rejected the suggestion that a plaintiff may invoke the waiver of sovereign immunity in Section 702 to avoid the limitations on the waiver of sovereign immunity under the QTA. 461 U.S. at 286 n.22. The Court reasoned that the QTA is an "other statute" granting consent to suit within the meaning of 5 U.S.C. 702(2), so that if a suit is untimely under the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(f), then "the QTA expressly 'forbids the relief' which would be sought under [Section] 702," 461 U.S. at 286 n.22. See *ibid.* (Section 702 "provides no authority to grant relief 'when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy.'") (quoting *House Report* 13).

Like *Block*, this case involves a suit that is within the general subject matter addressed by the QTA but is foreclosed by a specific limitation under the QTA, namely, the express exception for suits involving "Indian lands." Under *Block*, Patchak cannot avoid the limitations in the QTA by invoking the APA.

d. The court of appeals erroneously believed that sovereign immunity does not bar Patchak's lawsuit because Patchak does not himself claim an interest in the Bradley Property, and he therefore did not "bring a Quiet Title Act case." App., *infra*, 13a. The court's analysis was flawed because it focused on the relief that Patchak does *not* seek, rather than the relief that he *does* seek, which is to reverse the Secretary's acquisition of the Bradley Property as trust land for the Band, thus necessarily challenging the United States' title to the property and requiring the United States to relinquish that title. See Patchak C.A. Br. 26 (describing the relief

sought as including a direction to the district court "to order the Bradley [Property] taken out of trust"). That is precisely the consequence Congress sought to prevent by including in the QTA the bar to suits challenging the United States' title to land it holds in trust for Indians. It is therefore a consequence forbidden by Section 702(2)'s directive that nothing in the APA's waiver of sovereign immunity "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The court of appeals was of course correct that Patchak could not bring an action under the QTA because he does not assert his own interest in the property. App., *infra*, 13a-16a; see 28 U.S.C. 2409a(d). But the court drew the wrong lesson from that observation. One purpose of the QTA is to subject the United States' claim of title to adjudication by a court only where there is a party who has an adverse claim to the same property and who would otherwise suffer the "obviously unjust" hardship of being unable to remove a cloud on his title to that property. *Senate Report* 7. Without such a limitation, the United States would be exposed to numerous actions by various third parties who might wish to resolve a controversy concerning the United States' claim of title but who lack any competing claim to the same property. Such actions do not present the potential for hardship or concrete adversity regarding a particular parcel that would warrant subjecting the government to the burdens of suit concerning its title. Yet the court of appeals' holding leads to the perverse result that a party who claims no interest in the land at issue may challenge the United States' title to lands that are held in trust, even though the same challenge would be barred if brought by a party who claimed an interest in

the land. See *Neighbors for Rational Development*, 379 F.3d at 962 ("If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land."); *Florida Dep't of Bus. Regulation*, 768 F.2d at 1254-1255 ("It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.").

The court of appeals was undeterred by that anomaly, suggesting that it is "far-fetched to attribute an intention to the 1972 Congress [which passed the QTA] about a subject"—claims by individuals not seeking to quiet title in themselves—"not within the terms of the statutory language." App., *infra*, 19a. In fact, Patchak's claim falls squarely within "the terms of the statutory language": he "dispute[s]" the United States' trust "title to real property in which the United States claims an interest." See 28 U.S.C. 2409a(a). Moreover, the court's reasoning overlooks that the QTA was enacted against the background of a general rule of sovereign immunity. As Assistant Attorney General Scalia explained, Congress would have had no reason expressly to forbid relief to individuals who were not seeking to quiet title in themselves; the general rule of sovereign immunity already prevented those individuals from obtaining relief. *Senate Report* 27. The Congress that enacted the QTA imposed carefully considered limitations on its waiver of sovereign immunity with respect to suits challenging the United States' title to real property. Section 702 may not be used to circumvent those limitations.

2. The decision below conflicts with the decisions of three other courts of appeals

The court of appeals acknowledged that its interpretation of Section 702 directly conflicts with that of the other three circuits that have considered the question. App., *infra*, 18a (citing *Neighbors for Rational Development*, *Metropolitan Water Dist.*, and *Florida Dep't of Bus. Regulation*). Each of those circuits has held, contrary to the court here, that a plaintiff may not invoke the APA's waiver of sovereign immunity to circumvent the QTA's retention of the United States' sovereign immunity from suits seeking to adjudicate the United States' title to Indian trust lands, even if the plaintiff does not seek to quiet title in favor of himself. *Neighbors for Rational Development*, 379 F.3d at 962; *Metropolitan Water Dist.*, 830 F.2d at 143; *Florida Dep't of Bus. Regulation*, 768 F.2d at 1254-1255.

The court of appeals' decision is also in serious tension, if not direct conflict, with the Seventh Circuit's decision in *Shawnee Trail Conservancy* v. *United States Department of Agriculture*, 222 F.3d 383, 387-388 (2000), cert. denied, 531 U.S. 1074 (2001). In that case, the plaintiffs alleged that the Forest Service lacked authority to restrict the use of certain roads in a national forest because, they said, the roads were subject to various easements and rights-of-way, and therefore the Forest Service did not "own the property rights necessary to make decisions concerning their incidents of use." *Id.* at 386. Even though the plaintiffs did not themselves claim any interest in those easements or rights of way, the Seventh Circuit held that the QTA barred their suit. In reaching that conclusion, it stated that "the majority of courts that have considered the QTA in the context of claims that do not seek to quiet title in the party bring-

ing the action have nonetheless found the Act applicable, and we find the reasoning of these cases persuasive." *Id.* at 388; see *id.* at 387 (discussing *Metropolitan Water Dist.*). That reasoning cannot be reconciled with the decision of the court of appeals in this case.

3. If not corrected by this Court, the decision below will have significant adverse consequences

In *California* v. *United States*, 490 U.S. 920 (1989) (No. 87-1165), this Court granted certiorari to consider the relationship between Section 702 and the Indian trust-lands exception to the QTA, but the Court was equally divided and therefore did not resolve the issue. Review is even more appropriate now because the decision below creates a circuit conflict and because the court of appeals' erroneous decision makes it highly unlikely that further development of the law will occur in other circuits. Any plaintiff seeking to sue the Secretary can obtain venue in the United States District Court for the District of Columbia, 28 U.S.C. 1391(e), and in light of the decision below, there is little reason for a plaintiff to bring a case anywhere else.

If allowed to stand, the court of appeals' decision will severely disrupt the Secretary's acquisition of trust lands for Indians. The Secretary's regulations provide for a 30-day window for the initiation of litigation after the announcement of his intention to take land into trust. 20 C.F.R. 151.12(b). The decision in this case makes that time limit meaningless. Instead, any plaintiff who can establish standing can now bring an APA challenge to any trust acquisition within the preceding six years. 28 U.S.C. 2401(a). That is true whether the land was taken into trust pursuant to the Secretary's general authority under the Indian Reorganization Act,

25 U.S.C. 465, or pursuant to specific legislation enacted to provide a land base for a specified group of Indians. See, *e.g.*, Graton Rancheria Restoration Act, Pub. L. No. 106-568, Tit. XIV, 114 Stat. 2939 (25 U.S.C. 1300n to 1300n-6); Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798. That six-year period of uncertainty as to whether a trust acquisition will be subject to judicial challenge—and hence whether the land will securely be held in trust for the Tribe—will pose significant barriers to Tribes that are seeking the economic development of trust land. If left unreviewed, the circumvention of the QTA countenanced by the court of appeals will therefore frustrate the purpose of trust acquisitions, which is to provide a land base for Indians in order to "encourag[e] tribal self-sufficiency and economic development." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (internal quotation marks and citation omitted); see *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 220-221 (2005).

Indeed, the uncertainty surrounding the status of trust land may not even end six years after the land is taken into trust. The implication of the decision below could be that, whenever the Secretary takes final agency action with respect to Indian trust land, plaintiffs could bring an APA suit contending that his action was contrary to law because the land is not properly held in trust for Indians. That might even be so when the United States has held the land in trust for years and the Tribe has made substantial investments in it. Allowing such never-ending attacks on the trust status of lands would severely undermine the United States' long-standing recognition of tribal sovereignty, self-gover-

nance, and economic self-determination. That result warrants this Court's review.

B. The Court Of Appeals' Prudential-Standing Holding Conflicts With Decisions Of This Court And Also Warrants Review

1. To establish standing to invoke the jurisdiction of a federal court, a plaintiff must satisfy the "irreducible constitutional minimum of standing" by showing that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (brackets and citation omitted). In addition, this Court has recognized "judicially self-imposed limits on the exercise of federal jurisdiction," including the requirement that the plaintiff establish prudential standing. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). As relevant here, the doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed.*, 497 U.S. 871, 883 (1990); *Bennett* v. *Spear*, 520 U.S. 154, 175-176 (1997). The zone-of-interests test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

In this case, "the statutory provision whose [alleged] violation forms the legal basis for [Patchak's] complaint," *National Wildlife Fed.*, 497 U.S. at 883, is Section 5 of the IRA, which authorizes the Secretary to ac-

quire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. But that provision has nothing to do with the interests asserted in Patchak's suit—avoiding diminished property values, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land" near the site on which the Band has built a gaming facility. App., *infra*, 10a. Patchak therefore lacks prudential standing to maintain his suit, and the court of appeals' decision to the contrary conflicts with this Court's precedents in two different ways.

a. First, the court of appeals disregarded this Court's decision in *National Wildlife Federation* by failing to limit its zone-of-interests analysis to "the statutory provision whose violation forms the legal basis for [Patchak's] complaint." 497 U.S. at 883. Here, that provision is 25 U.S.C. 465, so the court should have focused its inquiry on Section 465. It would have been inappropriate for the court to consider the interests protected even by other provisions of the IRA itself, outside of Section 465. As this Court explained in *Bennett*, "[w]hether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." 520 U.S. at 175-176. But what the court of appeals actually did in this case was even less justified than that: the court evaluated the interests protected by the Indian Gaming Regulatory Act (IGRA), an entirely different statute enacted in 1988, some 54 years after the IRA.

The court of appeals attempted to justify its reliance on IGRA by asserting that the IRA's provisions are "linked" to those of IGRA, but that reasoning cannot

withstand scrutiny. App., *infra*, 8a. It is true that the IRA and IGRA are "linked" in the superficial sense that one way for a Tribe to operate a gaming facility (permitted by IGRA) is if the facility is located on land held in trust by the United States for the Tribe (and acquired under the IRA). But the presence of trust land is neither a necessary nor a sufficient condition for gaming to occur, both because there are additional provisions of IGRA that must be satisfied before a Tribe can operate a gaming facility, and also because a Tribe may conduct gaming on other lands, such as lands within an Indian reservation and restricted fee land, 25 U.S.C. 2703(4). More to the point, whatever role the IRA's limitations may happen to play today in protecting "the interests of those * * * who would suffer from living near a gambling operation," App., *infra*, 7a, there is no reason to suppose that Congress could even have imagined those interests, let alone actually sought to protect them, when it enacted the IRA in 1934. There is accordingly no basis for concluding that those interests are even arguably "within the 'zone of interests' sought to be protected" by 25 U.S.C. 465. *National Wildlife Fed.*, 497 U.S. at 883.

Of course, where the Secretary has determined that land is eligible for gaming, an entity with standing to challenge gaming on that land may bring a claim alleging that the determination violates IGRA. Indeed, MichGO brought just such a challenge to the Band's gaming operation, but it chose to abandon its claim on appeal. *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009). And should Patchak be able to identify some final agency action that he believes violates IGRA, he too could bring a claim alleging that IGRA was vio-

lated, if he establishes standing. His current suit, however, does not challenge the Bradley Property's eligibility for gaming under IGRA—he instead alleges that the Secretary could not acquire the Bradley Property in trust for the Band for *any* purpose.

The court of appeals relied on *Air Courier Conference* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991), but the court of appeals' analysis cannot be reconciled with this Court's decision in that case. App., *infra*, 8a. In *Air Courier Conference*, postal-employee unions sought to challenge a regulation suspending restrictions in private-express statutes, which regulate the conduct of the Postal Service's competitors. 498 U.S. at 519-520. The unions argued that the suspension would harm their members' employment opportunities, and they suggested that, in identifying the relevant zone of interests, the Court should look beyond the private-express statutes themselves to consider the broader Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, which codified those statutes. 498 U.S. at 528.

This Court rejected that suggestion. In so doing, the Court acknowledged that it had sometimes looked beyond the particular statutory provision invoked by a plaintiff to related provisions within the same statute. *Air Courier Conf.*, 498 U.S. at 529. But the Court explained that "the only relationship between the [private-express statutes], upon which the Unions rel[ied] for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rel[ied] for their standing, [was] that both were included in the general codification of postal statutes embraced in the PRA." *Ibid.* To accept the unions' argument, the Court observed, would require holding that the PRA was the

relevant statute for prudential standing, "with all of its various provisions united only by the fact that they dealt with the Postal Service." *Ibid.* The Court refused to apply that "level of generality" in conducting its prudential-standing analysis; to do so, it concluded, would "deprive the zone-of-interests test of virtually all meaning." *Id.* at 529-530. Thus, far from supporting the decision below, *Air Courier Conference* confirms that, under this Court's precedents, there is no basis for the court of appeals' conclusion that the zone of interests arguably sought to be protected by the Congress that passed the IRA in 1934 encompasses interests reflected in a statute passed more than a half-century later.

b. Second, the court of appeals erred in conflating Article III and prudential-standing principles. The court emphasized that a State has prudential standing to bring a suit alleging a violation of 25 U.S.C. 465 because the limitations prescribed in the IRA serve to protect a State's interest in its regulatory authority and tax revenue. App., *infra*, 9a-10a. According to the court, while "the nature" of a State's and Patchak's alleged injuries "may be different," Patchak's injuries "are just as cognizable." *Id.* at 10a. But alleging a cognizable injury is a requirement of *Article III* standing. That an injury is cognizable in that respect does not establish that it falls within the zone of interests intended to be protected by the statutory provision giving rise to the claim. See *Clarke*, 479 U.S. at 395-396 (explaining that the prudential-standing requirement under the zone-of-interests test "add[s] to the requirement" that a plaintiff suffer an injury in fact).

For similar reasons, the court erred in relying on *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), for the proposition that the "sorts of injuries [Patchak asserts] have

long been considered sufficient for purposes of standing." App., *infra*, 10a. In *Sierra Club*, the Court considered whether the plaintiffs had satisfied the injury-in-fact requirement of Article III, and it ultimately concluded that they had not. 405 U.S. at 734-740. Nothing in the Court's opinion addressed prudential standing.

2. The court of appeals' departure from the prudential-standing principles articulated by this Court warrants review in conjunction with review of the court's holding that relief is available under the APA, 5 U.S.C. 702, notwithstanding that the relief sought is precluded by the QTA. As explained above, the court's holding under Section 702 creates a cloud of uncertainty over any trust acquisition under the IRA. And the court of appeals' refusal to follow this Court's prudential-standing jurisprudence has greatly expanded the class of potential plaintiffs, essentially to anyone who asserts he will be injured by the uses to which the land held in trust by the United States for a Tribe might be put. In so holding, the court has permitted a party that Congress did not intend to be able to bring suit to obtain relief that Congress did not intend anyone to obtain. That result warrants correction by this Court.

If this Court were to reverse the court of appeals' APA holding, it would have no need to consider prudential standing. But because both issues are jurisdictional, the Court has discretion to determine the order in which it will consider them. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584-585 (1999). In order to ensure that the Court has the benefit of full briefing on all of the issues in this case, the petition for a writ of certiorari should be granted with respect to both questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5324

DAVID PATCHAK, APPELLANT

v.

KENNETH LEE SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., APPELLEES

Argued: Sept. 14, 2010
Decided: Jan. 21, 2011

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01331)

OPINION

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

RANDOLPH, *Senior Circuit Judge*:

The district court dismissed David Patchak's suit to prevent the Secretary of the Interior from holding land in trust for an Indian tribe in Michigan. Patchak's ap-

peal presents two jurisdictional issues: whether, as the district court held, he lacks standing; and whether, if he has standing, sovereign immunity bars his suit.

The land consists of 147 acres in Wayland Township, Michigan, a rural, sparsely populated farming community. The Secretary published in the Federal Register his decision to take this property—the Bradley Tract—into trust for the Match-E-Be-Nash-She-Wish Band, also known as the Gun Lake Band. 70 Fed. Reg. 25,596 (May 13, 2005). The Band owned the land and wanted to construct and operate a gambling facility there. To do this, the Band had to convince the Interior Secretary to take title to the land into trust pursuant to the Indian Gaming Regulatory Act. *See* 25 U.S.C. §§ 2701-21; *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 191-92 (D.C. Cir. 2010).

The Secretary's notice in the Federal Register announced that he would wait at least thirty days before consummating the transaction. The purpose of the delay, which 25 C.F.R. § 151.12(b) required, was "to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." 70 Fed. Reg. at 25,596.

During the thirty-day period, an anti-gambling organization—"MichGO"—brought an action claiming that the Secretary had violated the National Environmental Policy Act and the Indian Gaming Regulatory Act. The district court issued a stay of the Secretary's action. The court later dismissed the organization's suit, and this court affirmed. *See Mich. Gambling Opposition (MichGO) v. Norton*, 477 F. Supp. 2d 1 (D.D.C.

2007), *aff'd sub nom. Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008).

In the meantime, Patchak filed his complaint. He alleged that he lived near the Bradley Tract; that the Tribe's gaming facility would attract 3.1 million visitors per year; that this would destroy the peace and quiet of the area; that there would be air, noise and water pollution; that there would be increased crime in the area and a diversion of police and medical resources; and that the Secretary's proposed action was *ultra vires*. Patchak invoked general federal question jurisdiction and the Administrative Procedure Act. He claimed that because the Gun Lake Band was not under federal jurisdiction in 1934, the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79, did not authorize the Secretary to take the Band's land into trust. The Gun Lake Band intervened as a defendant.

After this court affirmed the dismissal of the *MichGO* action, the stay expired. The district court then denied Patchak's emergency motion for an order preventing the Secretary from proceeding with the land transaction. On January 30, 2009, the Secretary took the Bradley Tract into trust. Three weeks later, on February 24, the Supreme Court issued its opinion in *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009). The Court agreed with Patchak's argument that § 479 of the Indian Reorganization Act—the IRA—limited the Secretary's trust authority to Indian tribes under federal jurisdiction when the IRA became law in 1934.

Despite *Carcieri*, the Secretary urged the district court to dismiss Patchak's suit. He argued that the Quiet Title Act, 28 U.S.C. § 2409a, precluded any person

from seeking to divest the United States of title to Indian trust lands. In other words, by taking the Bradley Tract into trust for the Gun Lake Band while Patchak's suit was pending, the Secretary deprived the court of jurisdiction.

In August 2009, the district court dismissed the suit on a different ground—namely, that Patchak, "at a minimum, lacks prudential standing to challenge Interior's authority pursuant to section 5 of the IRA." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). The court reasoned that Patchak's "interests do not only not fall within the IRA's zone-of-interests, but actively run contrary to it." *Id.* at 78. The court also expressed doubt about its subject matter jurisdiction in light of the Quiet Title Act. *Id.* at 78 n.12.

I

There is no doubt that Patchak satisfied the standing requirements derived from Article III of the Constitution. Neither the Secretary nor the Band argues otherwise. In terms of Article III standing, the impact of the Band's facility on Patchak's way of life constituted an injury-in-fact fairly traceable to the Secretary's fee-to-trust decision, an injury the court could redress with an injunction that would in effect prevent the Band from conducting gaming on the property. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

We believe, contrary to the district court, that Patchak also fulfilled the judicially created zone-of-interests test for standing. The test began as a "gloss" on § 702 of the Administrative Procedure Act, 5 U.S.C. § 702. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395-96,

107 S. Ct. 750, 93 L. Ed. 2d 757 (1987). Section 702 allows judicial review of agency action by a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." As the Supreme Court formulated the test in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827 25 L. Ed. 2d 184 (1970), the "adversely affected or aggrieved" plaintiff must be trying to protect an interest of his that is "*arguably* within the zone of interests to be protected" by the "relevant" statutory provisions. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998).

The Supreme Court introduced the zone-of-interests test in recognition of the "trend . . . toward enlargement of the class of people who may protest administrative action." *Data Processing*, 397 U.S. at 154, 90 S. Ct. 827. The APA had "pared back traditional prudential limitations." *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985). Given the APA's "generous review provisions," *Bennett v. Spear*, 520 U.S. 154, 163, 117 S. Ct. 1154, 127 L. Ed. 2d 281 (1997) (internal quotation marks omitted), and the "drive for enlarging the category of aggrieved 'persons,'" *Data Processing*, 397 U.S. at 154, 90 S. Ct. 827, the test is not "especially demanding," *Clarke*, 479 U.S. at 399-400, 107 S. Ct. 750.

The Secretary tells us that the Indian Reorganization Act is "not concerned with the interests that Patchak asserts in this litigation." DOI Br. 31. The Band adds that the function of the IRA is to "give the Indians the control of their own affairs and of their own property." *See Mescalero Apache Tribe v. Jones*, 411

U.S. 145, 152, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (quoting 78 Cong. Rec. 11125 (1934)). But application of the zone-of-interests test does not turn on such generalities. *See Nat'l Credit Union Admin.*, 522 U.S. at 492-93, 118 S. Ct. 927. Patchak did not have to show that the Indian Reorganization Act was meant to benefit those in his situation. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *Am. Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 815 (D.C. Cir. 2005). The "analysis focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." *Mova*, 140 F.3d at 1075.

As the Secretary's announcement in the Federal Register stated, IRA § 465 (and the definition of Indians in § 479)[1] served as the predicate for the government's

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[1] Section 465 states:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

taking the Gun Lake Band's property into trust for the purpose of gaming under § 2719(b)(1)(B)(ii) of the Gaming Act.[2] The IRA provisions interpreted in *Carcieri* v. *Salazar*, 129 S. Ct. at 1066, limit the Secretary's trust authority. He may act only on behalf of tribes that were under federal jurisdiction at the time of the IRA's enactment in 1934. When that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected. And because

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The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Section 479 defines "Indians" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."

[2] *See* 70 Fed. Reg. at 25,596. The Gaming Act permits federally recognized Indian tribes to conduct gaming on "Indian lands." The Act defines "Indian lands" to mean all lands within any Indian reservation and "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe. . . ." 25 U.S.C. § 2703(4). Indian gaming is not permitted on "newly acquired lands"—that is, lands the Secretary took into trust for a tribe after October 17, 1988, when the Gaming Act went into effect. An exception to this bar, on which the Secretary relied in accepting the Bradley Tract, allows Indian gaming on lands the Secretary takes into trust after the 1988 date "as part of . . . the initial reservation of an Indian tribe." *Id.* § 2719(B)(I)(B)(ii); *see Butte Cnty., Cal.*, 613 F.3d at 191-92.

of their interests, they are proper parties to enforce the IRA's restrictions.

In reaching this conclusion, we have not—as the Secretary would have it—viewed the IRA provisions in isolation. Patchak's asserted injuries are the "negative effects of building and operating a casino" in his community. The Secretary claims that these "vague and generalized grievances have nothing to do with the purposes for which Congress enacted 25 U.S.C. § 465" and thus do not grant him prudential standing. DOI Br. 32. But Patchak's standing—for purposes of both Article III and the zone-of-interests test—must be evaluated in light of the intended use of the property. The IRA provisions are linked to the Gaming Act. *See Air Courier Conference of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 530, 111 S. Ct. 913, 112 L. Ed. 2d 125 (1991). In its fee-to-trust application filed with the Secretary, the Gun Lake Band invoked both statutes. One of the considerations in the Secretary's decision whether to take land into trust pursuant to the IRA is whether doing so would "further economic development . . . among the Tribes." *See Mich. Gambling Opposition*, 525 F.3d at 31. Indian gaming is meant to do just that. 25 U.S.C. § 2701(4). Taken together, the limitations in these statutes arguably protected Patchak from the "negative effects" of an Indian gambling facility.

The Interior Department itself recognizes the interests of individuals like Patchak who live close to proposed Indian gaming establishments. A regulation already mentioned (25 C.F.R. § 151.12(b)) gives "affected members of the public" thirty days to seek judicial review before the Secretary takes land into trust for an Indian tribe. 61 Fed. Reg. 18,082 (1996). By any mea-

sure, Patchak fits within the category of "affected members of the public." Other regulations require the Secretary to consider the purpose for which the land will be used and whether taking a tribe's land into trust would give rise to "potential conflicts of land use." 25 C.F.R. § 151.10(c), (f). Internal memoranda regarding the Band's application show that members of the Interior Department considered such conflicts here and accepted the Wayland Township Supervisor's assertion that the gaming facility would be "compatible with the surrounding land use." We realize that the APA and *Data Processing* require the litigant's interests to be measured by statutes not regulations. *See Nat'l Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1043 (D.C. Cir. 1989). But regulations implementing statutes may cast some light on what the statutes arguably protect.

The Secretary argues that the State of Michigan, not Patchak, is the proper entity to police the Secretary's authority to take lands into trust under the IRA. He acknowledges cases in which states or municipalities or their officials have been allowed to sue to prevent the Secretary from taking land into trust for the purposes of Indian gaming. *See, e.g., Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, 625 F.3d 501 (8th Cir. 2010); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001). *Carcieri v. Salazar* is another example, although the land there was to be used for Indian housing rather than gaming. 129 S. Ct. at 1060. (The plaintiffs in *Carcieri* were a town, a state and the governor.) The Secretary offers a distinction between those cases and Patchak's: a state in which the land is located is a proper entity to police the Secretary's trust decision "because it stands to lose some of its regulatory authority as a result of Interior's trust acquisition." DOI Br.

36-37. But the distinction cannot hold. If the interests of a state or a municipality are within the zone of interests the IRA protects then so are Patchak's interests. A state may, as the Secretary contends, lose some regulatory authority and, depending on the intended use of the trust land, some tax revenue. *But see Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989). But the Secretary is merely describing the nature of the state's injuries. Patchak's injuries may be different, but they are just as cognizable. Among other things, he alleged that the rural character of the area would be destroyed, that the value of his property would be diminished and that he would lose the enjoyment of the agricultural land surrounding the casino site. These sorts of injuries have long been considered sufficient for purposes of standing. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

As a practical matter it would be very strange to deny Patchak standing in this case. His stake in opposing the Band's casino is intense and obvious. The zone-of-interests test weeds out litigants who lack a sufficient interest in the controversy, litigants whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399, 107 S. Ct. 750. Patchak is surely not in that category. We therefore hold that he had prudential standing to bring this action.

II

This brings us to the question whether the government has consented to Patchak's suit.

Section 702 of the APA waives the government's sovereign immunity in the following terms: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702. Patchak does not seek money damages and he has stated a claim that an agency—the Interior Department—and its Secretary acted under color of legal authority.

Patchak's action therefore seems to fit within the waiver of sovereign immunity in § 702. But the last clause of the section states: "Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Secretary argues that the Quiet Title Act is such a statute.

We set forth the relevant provisions of the Quiet Title Act in the margin.[3] The Act, in its first subsection,

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[3] 28 U.S.C. § 2409a provides in relevant part:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952, (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section

waives sovereign immunity: "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). This is followed by the provision that directly concerns us: "This section does not apply to trust or restricted Indian lands. . . ." *Ibid.* The Supreme Court has held that the Act provides "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property," *Block v. North Dakota*, 461 U.S. 273, 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983), and that, when applicable, the Indian lands exception operates "to retain the United States' immunity to suit," *United States v. Mottaz*, 476 U.S. 834, 842, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986).

The proper question therefore is whether Patchak's suit is, in the words of the statute, the sort of "action under this section" for which the United States has waived sovereign immunity except with respect to In-

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pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

dian lands. That is, did Patchak bring a Quiet Title Act case? *Cf. Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992). If not, the Quiet Title Act does not forbid the relief Patchak seeks, and the APA has waived the government's immunity from suit. *Id.* at 609; *see also Block v. North Dakota*, 461 U.S. 273, 286 n.22, 103 S. Ct. 1811, 74 L. Ed. 2d 840 (1983).

The official name of the Quiet Title Act, passed in 1972, was "An Act to permit suits to adjudicate certain real property quiet title actions." Pub. L. No. 92-562, 86 Stat. 1176.[4] This provides a clue about the statute's coverage. Actions to "quiet title" originated in the courts of equity as a means of preventing a multiplicity of suits at law. 4 POMEROY, EQUITY JURISPRUDENCE § 1394 (5th ed. 1941). Referred to as either "bills of peace" or "bills *quia timet*," they existed in two forms. The first allowed the holder of legal title to land to prevent a single adverse claimant from bringing successive actions of ejectment against the plaintiff for the same parcel. 1 *Id.* § 253. For equity to intervene, the plaintiff was required to be in possession of the land and to have sufficiently established his title in at least one previous action at law. *Ibid.* The second form allowed the holder of legal or equitable title to land to bring one suit against many persons asserting equitable titles to the same land. 4 *Id.* § 1396. Like the first form, plaintiffs were required to be in possession of the land in dispute.

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[4] Before enactment of the Quiet Title Act, an adverse claimant's only legal remedy was an action for just compensation under the Tucker Act, 28 U.S.C. § 1491. Unless the United States voluntarily instituted a quiet title action or the claimant successfully petitioned Congress or the Executive for discretionary relief, he could not recover possession of the property. *See Block*, 461 U.S. at 280-81, 103 S. Ct, 1811.

Ibid. Later statutes expanded quiet title actions, sometimes removing the requirement of possession, *ibid.*, and often allowing the actions to determine ownership. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 551 (3d ed. 2002).

As should be apparent from this summary, a common feature of quiet title actions is missing from this case. In each of the forms just mentioned, the plaintiff would seek to establish his rightful title to the real property. The modern definition of the action is the same: "A proceeding to establish plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it." BLACK'S LAW DICTIONARY 34 (9th ed. 2009). Patchak is not requesting relief of that sort; he mounts no claim of ownership of the Bradley Tract. We recognize that the title of a statute cannot alter the meaning of the statute's operative language. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998). But it is of some interpretive use. *Ibid.* And here there is more than just the title. As part of the same 1972 legislation, Congress amended the venue statute to provide that "[a]ny civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States" shall be brought in the district where the property is located. 28 U.S.C. § 1402(d).[5] Congress also gave the district courts jurisdiction over civil actions "under section 2409a to quiet title." 28 U.S.C. § 1346(f). Congress thus viewed § 2409a as authorizing a proceeding known as a "quiet title" action. And the language of § 2409a firmly indicates that

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[5] *See also* 28 U.S.C. § 2410(a)(1), dealing with "quiet title" actions involving property in which the United States holds a security interest.

Congress intended to enact legislation building upon the traditional concept of an action to quiet title.[6]

This much is apparent from the Act's pleading requirement. "The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, [and] the circumstance under which it was acquired. . . ." 28 U.S.C. § 2409a(d). Failure to comply may result in dismissal of the complaint. *See, e.g., Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978). This provision tells us what constitutes an "action under this section." 28 U.S.C. § 2409a(a). It is an action in which the plaintiff is claiming an interest in real property contrary to the government's claim of interest. Neither the brief of

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[6] As the Department of Justice put it:

> The bill would allow the United States to be made a party to an action in the Federal district courts to quiet title to lands in which the United States claims an interest.
>
> Suits to quiet title or to remove a cloud on title originated in the equity court of England. They were in the nature of bills *quia timet*, which allowed the plaintiff to institute suit when an action would not lie in a court of law. For instance, a plaintiff whose title to land was continually being subjected to litigation in the law courts could bring a suit to quiet title in a court of equity in order to obtain an adjudication on title and relief against further suits. Similarly, one who feared that an outstand [sic] deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title. The plaintiff in such suits was required to be in possession, and the usual grounds of equitable jurisdiction (an imminent threat and an inadequate remedy at law) had to be present.

Letter from Attorney General to Speaker, House of Representatives, *reprinted in* H.R. Rep. No. 92-1559, at 8-9 (1972) 1972 U.S.C.C.A.N. 4547, 4554.

the Secretary nor that of the Band confronts this language.

Nor do they deal with subsection (b) of the Act. This provision gives the United States the option of retaining possession of the property if it loses the quiet title action, so long as the government pays just compensation to the person entitled to the property. *Id.* § 2409a(b). The provision is senseless unless there is someone else—the plaintiff—claiming ownership. Again, the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit.

The origins of the Act and the committee reports accompanying it contain examples of the types of suits the legislation was expected to cover. *See Suits to Adjudicate Disputed Titles to Land in Which the United States Claims an Interest: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H Comm. on the Judiciary on S. 216*, 95th Cong. 2-6 (1972) (statement of Sen. Frank Church) ("House Judiciary Committee Hearing"); H.R. Rep. No. 92-1559, 1972 U.S.C.C.A.N. (1972); S. Rep. No. 92-575 (1971). All of these examples were suits in which plaintiffs claimed title to property. *E.g.*, H.R. Rep. No. 92-1559, at 6; S. Rep. No. 92-575, at 1, 5; *Dispute of Titles on Public Lands: Hearing Before the Subcomm. on Pub. Lands of the S. Comm. on Interior and Insular Affairs*, 92d Cong. 20, 55 (1971); House Judiciary Committee Hearing, *supra*, at 45-46 (statement of R. Blair Reynolds).

Two Supreme Court decisions have interpreted the Quiet Title Act. Neither is inconsistent with our view that Patchak's suit is not an action under that statute, although the government and the Band try to convince us otherwise. *Block v. North Dakota*, 461 U.S. 273, 103

S. Ct. 1811, 75 L. Ed. 2d 840 (1983), was a typical quiet title action. As the Court put it, "the United States and North Dakota assert competing claims to title to certain portions of the bed of the Little Missouri River within North Dakota." *Id.* at 277, 103 S. Ct. 1811. The Court held in *Block* that the Quiet Title Act was "the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id.* at 286, 103 S. Ct. 1871. But by "adverse claimant" the Court meant "States and all others asserting title to land claimed by the United States," *id.* at 280, 104 S. Ct. 1811, a description that does not fit Patchak.

Three years later, the Court took up the Quiet Title Act once more in *United States v. Mottaz*, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986). The issue was, as in *Block*, the applicability of the Act's twelve-year statute of limitations. The plaintiff claimed that the Bureau of Indian Affairs had sold three parcels of land in which she had an interest to the United States Forest Service and the Chippewa National Forest "without [her] consent or permission." *Id.* at 838, 106 S. Ct. 2224. She requested "[d]amages in a monetary sum equal to the current fair market value of each parcel illegally transferred," invoking several jurisdictional grants (not including the Quiet Title Act). *Ibid.* (internal quotation marks omitted) (alteration in original). The Court held again that the Quiet Title Act provides the exclusive means for "adverse claimants" to challenge the United States' title. *Id.* at 841, 106 S. Ct. 2224. Mottaz sought "a declaration that she alone possesses valid title to her interests in the [parcels of land] and that the title asserted by the United States is defective." *Id.* at 842, 106 S. Ct. 2224. Her claim was therefore "clearly . . . within the Act's scope." *Ibid.* Because her claim had

accrued more than twelve years before she filed her complaint, it was barred. *Id.* at 844, 106 S. Ct. 2224.

In short, the plaintiffs in *Block* and *Mottaz* were the type of "adverse claimants" traditionally found in quiet title actions. Patchak's position is different. He does not seek a declaration that "[]he alone possesses valid title" to the Bradley Tract, *Mottaz*, 476 U.S. at 842, 106 S. Ct. 2224, and he is not an adverse claimant.

We acknowledge the views of the Ninth, Tenth and Eleventh Circuits that this difference does not matter, that the Quiet Title Act bars suits seeking to "divest[] the United States of its title to land held for the benefit of an Indian tribe," whether or not the plaintiff asserts any claim to title in the land. *Fla. Dep't of Bus. Regulation v. Dep't of Interior*, 768 F.2d 1248, 1253-55 (11th Cir. 1985); *see also Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-63 (10th Cir. 2004); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987).

These opinions appear to rest on two related rationales, neither of which we find convincing. The first is that the legislative history of the Indian lands exception shows that it rested on the federal government's "solemn obligations . . . to the Indian people." *Neighbors*, 379 F.3d at 962 (quoting H.R. Rep. No. 92-1559, at 13 (1972), 1972 U.S.C.C.A.N. 4547, 4556-67, 1972 U.S.C.C.A.N. 4547, 4556-57 (letter from Mitchell Melich, Solicitor for the Dep't of the Interior)); *see also Metro. Water Dist.*, 830 F.2d at 143-44; *Fla. Dep't*, 768 F.2d at 1253-54. This may be true, but we do not see why that should alter our analysis. If Patchak's suit is the type of quiet title action the Act governs, then the fact that the disputed property is Indian trust land means that gov-

ernment has not waived sovereign immunity. It also means that Patchak could not rely on § 702 of the APA to supply the missing consent to suit. On the other hand, if—as we believe— Patchak's suit is not governed by the Quiet Title Act, then § 702 of the APA waives the government's sovereign immunity.

The second rationale is this: "If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust lands." *Neighbors*, 379 F.3d at 963; *see Fla. Dep't*, 768 F.2d at 1254-55. We do not find the point at all telling. Congress passed the Quiet Title Act in 1972. At the time there was no general waiver of the government's sovereign immunity for non-monetary actions. The 1972 Congress therefore did not have to concern itself with plaintiffs such as Patchak who were not seeking to quiet title. Patchak could not have successfully sued the United States over the Bradley Tract even if Congress had not inserted the Indian lands exception in the Quiet Title Act. Given these circumstances, it seems to us rather far-fetched to attribute an intention to the 1972 Congress about a subject not within the terms of the statutory language.

Matters changed in 1976 when Congress amended the APA to include a general waiver of sovereign immunity. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (amending 5 U.S.C. § 702). This legislation, recommended by the Administrative Conference of the United

States[7] and supported by the Department of Justice,[8] was consistent with the trend toward easing restrictions on judicial review of administrative action, a trend identified in *Data Processing*, 397 U.S. at 154, 90 S. Ct. 827, and its companion case, *Barlow v. Collins*, 397 U.S. 159, 166, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970). As then-Assistant Attorney General Antonin Scalia explained in a letter to Senator Kennedy, one of the main reasons for abolishing sovereign immunity in these kinds of cases was "the failure of the criteria for sovereign immunity, as they have been expressed in a long and bewildering series of Supreme Court cases, to bear any relationship to the real factors" that should control.[9] By waiving sovereign immunity, Congress sought to ensure that courts could review "the legality of official conduct which adversely affects private persons." H.R. Rep. No. 94-1656, at 5, 1976 U.S.C.C.A.N. 6121, 6125. As the House Report put it:

> Just as there is little reason why the United States as a landowner should be treated any differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific

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[7] 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 23-24 (1970).

[8] Letter from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, to Edward M. Kennedy, Chairman, Subcomm. on Admin. Practice & Procedure, U.S. Senate, *reprinted in* H.R. Rep. No. 94-1656, at 25, 1976 U.S.C.C.A.N. 6121, 6150.

[9] Letter from Antonin Scalia, *supra* note 8, at 26; *see also* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-lands Cases*, 68 MICH. L. REV. 867 (1970).

> relief against a Federal agency or offer acting in an official capacity.

Id. at 9.

We may agree that the Quiet Title Act of 1972 reflects a congressional policy of honoring the federal government's solemn obligations to Indians with respect to title disputes over Indian trust land. We may also agree that the amendment to § 702 of the APA in 1976 reflects a congressional policy of easing restrictions on judicial review of agency action seeking non-monetary relief. Which of these policies should prevail? The courts of appeals mentioned above have extended the reach of the Quiet Title Act beyond its text to favor one policy without giving any indication that they considered the other. For our part, we agree with the Supreme Court in *Carcieri* that we need not chose between "these competing policy views." 129 S. Ct. at 1066-67. For the reasons we have discussed, it is enough that the terms of the Quiet Title Act do not cover Patchak's suit. His action therefore falls within the general waiver of sovereign immunity set forth in § 702 of the APA.[10]

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[10] In light of our determination that the Quiet Title Act does not bar Patchak's claim, we do not address whether sovereign immunity should be determined as of the date his complaint was filed rather than after the Secretary took the land into trust. *Cf. Grupo Dataflux* v. *Atlas Global Grp.*, 541 U.S. 567, 570, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004). We also decline Patchak's request that we decide whether the Band was under federal jurisdiction in 1934, or any other remaining issues. *See Doe* v. *DiGenova*, 779 F.2d 74, 89 (D.C. Cir. 1985).

* * *

The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5324
No. 1:08-cv-01331-RJL

DAVID PATCHAK, APPELLANT

v.

KENNETH LEE SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., APPELLEES

Filed: Mar. 28, 2011

ORDER

Before: SENTELLE, Chief Judge; GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges; and RANDOLPH, Senior Circuit Judge.

Upon consideration of the petitions of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and the Federal appellees for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5324
No. 1:08-cv-01331-RJL

DAVID PATCHAK, APPELLANT

v.

KENNETH LEE SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., APPELLEES

Filed: Mar. 28, 2011

ORDER

Before: HENDERSON and GRIFFITH, Circuit Judges and RANDOLPH, Senior Circuit Judge.

Upon consideration of the petitions of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and the Federal appellees for panel rehearing filed on March 7, 2011, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 08-1331 (RJL)

DAVID PATCHAK, PLAINTIFF

v.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, AND LARRY ECHO HAWK, IN HIS OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS,[1] DEFENDANTS,

AND

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, INTERVENOR-DEFENDANT

[Filed Aug. 20, 2009]

MEMORANDUM OPINION

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the Court will automatically substitute that officer's successor. Accordingly, the Court substitutes Ken L. Salazar for Dirk Kempthorne and Larry Echo Hawk for Carl J. Artman.

Plaintiff David Patchak brings this lawsuit challenging the Secretary of the Interior's ("Secretary" or "United States") decision to take into trust two parcels of land in Allegan County, Michigan, on behalf of intervenor-defendant Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Tribe") pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. Plaintiff seeks an injunction barring the Secretary from taking the land into trust on the basis that the Tribe was not under Federal jurisdiction in June 1934, as required by the IRA. (Compl. ¶ 28 [Dkt. #1].) Presently before the Court is the United States' Motion to Dismiss [Dkt. #20], the Tribe's Motion for Judgment on the Pleadings [Dkt. #19], and plaintiff's motions for preliminary injunctive relief [Dkt. #s 36, 46]. Because plaintiff fails to establish prudential standing, the Court will GRANT the Motion to Dismiss and Motion for Judgment on the Pleadings and will DENY the motions for preliminary injunctive relief.

BACKGROUND

In May 2005, the Bureau of Indian Affairs of the Department of Interior announced that it would take 147 acres of land in Wayland Township, Michigan, (the "Bradley Property") into trust for the Tribe pursuant to section 5 of the IRA, (Compl. ¶ 21), which authorizes the Secretary to take land into trust "for the purpose of providing land for Indians."[2] Notice of Final Agency Deter-

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[2] Section 5 of the IRA provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands,

mination to take Land into Trust Under 25 C.F.R. Part 151, 70 Fed. Reg. 25,596 (Bureau of Indian Affairs, Interior, May 13, 2005). The Tribe had petitioned Interior in 2001 to take the property into trust, and the Tribe plans to construct and operate a casino on the property to promote economic self-sufficiency and advance its members' economic well-being. (Compl. ¶ 20); *see generally Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008) ("*MichGO II*").

Shortly after Interior's announcement, the non-profit membership organization Michigan Gambling Opposition ("MichGO") filed a lawsuit in this district in an effort to obstruct the proposed casino.[3] MichGO alleged that Interior's approval of the casino violated both the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq.*, and the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.* MichGO also contended that section 5 of the IRA was an unconstitutional delegation of legislative authority. The dis-

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within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479.

[3] MichGO filed its lawsuit during the required 30-day waiting period following Interior's announcement of its decision to take the land into trust. *See* 25 C.F.R. § 151.12(b).

trict court granted summary judgment for the defendants in February 2007, *Michigan Gambling Opposition v. Norton*, 477 F. Supp. 2d 1, 22 (D.D.C. 2007) ("*MichGO I*"), and our Court of Appeals affirmed in April 2008, *MichGO II*, 525 F.3d at 26. MichGO's petition for rehearing en banc review was subsequently denied in July 2008.[4] *Michigan Gambling Opposition v. Kempthorne*, No. 07-5092 (D.C. Cir., Order filed July 25, 2008) ("*MichGo III*").

Plaintiff filed the present lawsuit shortly thereafter, on August 1, 2008, pursuant to § 702 of the Administrative Procedure Act ("APA"). Plaintiff alleges that the Tribe was not under Federal jurisdiction in June 1934, when the IRA was enacted, and therefore Interior lacks authority to take the Bradley Property into trust for the Tribe under section 5 of the IRA. (Compl. ¶¶ 25-33.) Plaintiff further alleges that if the property is taken into trust, his rural lifestyle and community will be adversely affected by the proposed casino.[5] (Compl. ¶ 9.) The cata

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[4] Our Court of Appeals granted, however, MichGO's motion to stay issuance of the mandate pending the Supreme Court's decision on MichGO's pending petition for a writ of certiorari, *MichGo III*, No. 07-5092 (D.C. Cir., Order filed Aug. 15, 2008)), thereby precluding Interior from taking the land into trust immediately.

[5] In his complaint, plaintiff describes his injuries as follows:

> Mr. Patchak will be disproportionately affected if the Property is placed in trust and the Gun Lake Band follows through with its plans to build a 200,000-square-foot casino complex that is anticipated to draw more than 3.1 million visitors a year. Such a casino would detract from the quiet, family atmosphere of the surrounding rural area. Among the negative effects of building and operating the anticipated casino in Mr. Patchak's community are: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic;

lyst for plaintiff's lawsuit—filed three years after Interior's announcement of its decision to take the land into trust—was the Supreme Court's grant of a petition for a writ of certiorari in February 2008 to review the First Circuit's unrelated decision in *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *certiorari granted in part*, __ U.S. __, 128 S. Ct. 1443, 170 L. Ed. 2d 274 (2008).[6] *(See* Compl. ¶¶ 29-30, 33). In *Carcieri*, the First Circuit had held that Interior had the authority to take land into trust for the Narragansett Indian Tribe in Rhode Island under section 5 of the IRA despite the fact that the tribe was not under Federal jurisdiction when the IRA was enacted.[7] *Carcieri*, 497 F.3d at 34.

(d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.

(Compl. ¶ 9.)

[6] During its appeal, MichGO attempted to add the same claim based on *Carcieri* that plaintiff advances here, but our Court of Appeals denied MichGO's motion to supplement. *(MichGo III*, No. 07-5092 (D.C. Cir., Order filed Mar. 19, 2008)).

[7] The Supreme Court ultimately reversed the First Circuit, holding that the phrase "now under federal jurisdiction," as part of the IRA's definition of "Indian," unambiguously refers to those tribes that were under Federal jurisdiction when then IRA was enacted in 1934. *Carcieri v. Salazar*, __ U.S. __, 129 S. Ct. 1058, 1061, 172 L. Ed. 2d 791 (2009). Because the parties effectively conceded that the Narragansett Indian Tribe was not under Federal jurisdiction at that time, the Court held that Interior was without authority to take land into trust for the tribe. *Id.* at 1061, 1068.

On October 6, 2008, both the United States and the Tribe filed Rule 12 motions seeking judgment in their favor on the basis that plaintiff lacks prudential standing.[8] While the United States' and the Tribe's motions were pending, plaintiff filed two motions for preliminary relief seeking orders enjoining Interior from taking the land into trust if, and when, the Supreme Court denied MichGO's petition for a writ of certiorari.[9] The Court heard oral argument on plaintiff's motions for preliminary injunctive relief on January 26, 2009, at which time the Court denied plaintiffs request for a temporary restraining order and took plaintiff's request for a preliminary injunction under advisement.[10] For the following reasons, the Court agrees that plaintiff, at a minimum, lacks prudential standing to challenge Interior's authority pursuant to section 5 of the IRA.

ANALYSIS

The United States and the Tribe argue that plaintiff's interests are fundamentally at odds with the purpose of the IRA and therefore plaintiff does not fall within the IRA's "zone of interests" and lacks prudential standing. I agree.

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[8] The Tribe also argues that plaintiff's claim is barred by the doctrine of laches.

[9] Plaintiff's second motion strategically sought an injunction enjoining Interior from taking the land into trust prior to a decision by this Court on plaintiff's first motion for preliminary injunctive relief.

[10] The Supreme Court denied MichGO's petition for a writ of certiorari on January 21, 2009. (Joint Notice, Jan. 21, 2009 [Dkt. #45].) The Court of Appeals' mandate issued January 27, 2009, and Interior took the Bradley Property into trust for the Tribe on January 30, 2009. (Defs.' Notice, Jan. 30, 2009 [Dkt. #49].)

Standing to pursue a claim encompasses two components: constitutional and prudential. *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 281 (D.C. Cir. 1988). As to the former, a plaintiff must allege "that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (internal quotation marks omitted). As to the latter, the "plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287 (D.C. Cir. 2005). If a plaintiff's claim fails either component, the Court lacks subject matter jurisdiction over the lawsuit.

While the prudential standing requirement is "not meant to be especially demanding," it excludes plaintiffs whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987); *Hazardous Waste Treatment Council*, 861 F.2d at 283 (prudential standing test "demands less than a showing of congressional intent to benefit but more than a 'marginal relationship' to the statutory purposes" (internal alteration omitted)). Indeed, the idea behind the requirement is "a presumption that Congress intends to deny standing to 'those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.'" *Hazardous Waste Treatment Council v.*

Thomas, 885 F.2d 918, 922 (D.C. Cir. 1989) (*"Thomas"*) (quoting *Clarke*, 479 U.S. at 397, n.12, 107 S. Ct. 750). Where, as here, a plaintiff's claim is brought pursuant to the judicial review provisions of the APA, the Court looks to interests protected by the substantive provisions of the underlying statute. *See Bennett*, 520 U.S. at 175, 17 S. Ct. 1154; *see also Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) ("The first step in the prudential standing analysis is to identify the interests protected by the statute.").

Plaintiff, without a doubt, is not an intended beneficiary of the IRA. The purpose and intent of the IRA is to enable tribal self-determination, self-government, and self-sufficiency in the aftermath of "a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 35 L. Ed. 2d 114 (1973) (citing H.R. Rep. No. 1804, 73d Cong. 2d Sess. 6 (1934)). As the Supreme Court itself noted, "[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see also MichGO II*, 525 F.3d at 32 (overall purpose of the IRA is to "advance[e] economic development among American Indians"); *Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996). In addition, Section 5's grant of authority to the Secretary to take land into trust at his discretion for Indians and Indian tribes serves the specific purpose of reversing the consequences of the federal government's previous allotment policy, which had resulted in many tribal lands being lost. *See MichGO II*, 525 F.3d at 31-32 (discussing section 5's role as part of a "broad effort to promote economic development among American Indians, with a

special emphasis on preventing and recouping losses of land caused by previous federal policies"). *In* short, both the IRA as a whole, and section 5 in specific, operate to protect, and promote, tribal self-determination and economic independence.

Plaintiff's alleged injuries could not be further divorced from these objectives. Plaintiff is not an Indian, nor does he purport to seek to protect or vindicate the interests of any Indians or Indian tribes. Rather, plaintiff seeks to vindicate only his own environmental and private economic interests. (Compl. ¶ 9.) Plaintiff also fails to point to any explicit, or implicit, indication in the IRA or its legislative history that the statute is intended to protect, or benefit, an individual in plaintiff's position. In an effort to sidestep this paucity of evidence, plaintiff alleges instead that he has a general interest in ensuring that only qualified tribes receive benefits under the IRA. But such an interest, if true, is indistinguishable from the general interest every citizen or taxpayer has in the government complying with the law. To find that plaintiff has prudential standing on this basis alone would make a mockery of the prudential standing doctrine altogether. *See Hazardous Waste Treatment Council*, 861 F.2d at 283 ("[A] rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue."). Indeed, this Court has held at least twice that merely being a taxpayer is insufficient to establish prudential standing under the IRA. *Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 468 (D.D.C. 1978) (individual taxpayers did not have prudential standing to challenge tribe's eligibility under IRA for Secretary of Interior to take land into

trust on tribe's behalf); *Tacoma v. Andrus*, No. 77-1423, slip op. at 4 (D.D.C. Jan. 20, 1978) [Dkt. #30-32 (same)]. Plaintiff, accordingly, does not fall within the group of those "who in practice can be expected to police the interests" protected by the IRA, *Mova Pharm. Corp.*, 140 F.3d at 1075, but rather is one whose "suit[] [is] more likely to frustrate than to further statutory objectives," *Thomas*, 885 F.2d at 922 (internal quotation marks omitted).[11]

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[11] Plaintiff's reliance on cases involving challenges to proposed casinos under IGRA and NEPA also cannot save plaintiff's case. Unlike IGRA and NEPA, no evidence indicates that the IRA focuses on or otherwise seeks to protect the interests of the surrounding community or the environment. IGRA, for example, only permits gaming on lands taken into trust after October 1988 if the land is an "initial reservation" unless there has been a finding that gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Similarly, NEPA's overarching focus is environmental interests, and it requires agencies take a "hard look" at the environmental consequences of their proposed courses of action. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). Because there is no evidence that Congress similarly enacted the IRA to protect any such interests, cases finding prudential standing under IGRA and NEPA are inapposite. *E.g., Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 464 (D.C. Cir. 2007) (plaintiffs had prudential standing to challenge Secretary's interpretation of "initial reservation" exception because "inclusion of [the surrounding community] provision demonstrates that Congress could not have intended to preclude efforts to enforce it, even if enforcement might prevent a landless tribe from gaining the benefits of IGRA"); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 189-90 (D.D.C. 2002) (citizens organization had prudential standing under IGRA and NEPA to challenge certain aspects of Bureau of Indian Affairs' decision to take land into trust for a tribe planning to construct a casino). Indeed, many, if not all, of the injuries plaintiff alleges were previously alleged by the plaintiff in the MichGO

Accordingly, because plaintiff's interests do not only not fall within the IRA's zone-of-interests, but actively run contrary to it, plaintiff lacks prudential standing. As a result, this Court lacks subject matter jurisdiction over this case and must, and will GRANT the United States' Motion to Dismiss and the Tribe's Motion for Judgment on the Pleadings.[12] Accordingly, plaintiff's outstanding motions, including his motions for preliminary injunctive relief, are DENIED.[13]

/s/ RICHARD J. LEON
RICHARD J. LEON
United States District Judge

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action, which was brought pursuant to IGRA and NEPA. Compare Compl. ¶ 9 *with MichGO I*, 477 F. Supp. 2d at 3.

[12] The Court's continuing subject matter jurisdiction over this case is also seriously in doubt given that Interior took the land into trust on January 30, 2009. Under the Indian lands exception to the Quiet Title Act, the United States' waiver of sovereign immunity in civil actions "to adjudicate a disputed title to real property in which the United States claims an interest" does not apply "to trust or restricted Indian lands." 28 U.S.C. § 2409a(a); *see, e.g., Governor of Kansas* v. *Kempthorne*, 516 F.3d 833, 843-44 (10th Cir. 2008) (plaintiff's APA challenge to Interior's decision to take land into trust for Indian tribe was barred by Quiet Title Act when land was already held in trust). However, because the Court finds that plaintiff lacks prudential standing, the Court need not, and does not, reach that issue in this opinion.

[13] Plaintiff also filed a motion for summary judgment [Dkt. #52] following his motions for preliminary injunctive relief. The parties also filed a joint motion for the Court to delay consideration of the emergency injunctive relief until after the United States Supreme Court ruled on MichGO's petition for writ of certiorari. The Court will deny these motions as moot.

APPENDIX E

1. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 25 U.S.C. 465 provides:

Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and

such lands or rights shall be exempt from State and local taxation.

3. 28 U.S.C. 2409a provides:

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provi-

sions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(*l*) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.